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FEDERAL COMMUNICATIONS COMMISSION
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SPECIAL COUNSEL
JEROLD L. JACOBS

June 28, 1993

William F. Caton, Acting Secretary
Federal Communications Commission
Washington, D.C. 20554

Re: MM Docket No. 93-91
FM Table of Attachments

Dear Mr. Caton:

Enclosed herewith, on behalf of Kingsley H. Murphy, Jr., licensee of Station WISS-FM, Berlin, Wisconsin, are an original and four (4) copies of his "REPLY COMMENTS OF KINGSLEY H. MURPHY, JR." in the above-referenced proceeding.

Please direct all inquiries and communications concerning this matter to the undersigned.

Very truly yours,

Jerold L. Jacobs /dlm

Jerold L. Jacobs

Enc.

cc: As on Certificate of Service (all w/enc.)

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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of

Amendment of Section 73.202(b),
Table of Allotments,
FM Broadcast Stations
(Berlin, DeForest, and
Wautoma, Wisconsin

)
)
) MM Docket No. 93-91
)
) RM-8197
)
)

To: Chief, Allocations Branch

Background

1. The subject rulemaking proceeding was initiated by Notice of Proposed Rule Making and Order to Show Cause ("NPRM"), 8 FCC Rcd 2747 (MM Bur. 1993), which proposed to allot Channel 226A to DeForest, Wisconsin as that community's first local transmission service, to substitute Channel 284A for Channel 272A at Berlin, Wisconsin and modify the license of Murphy's Station WISS-FM accordingly, and to substitute Channel 272A for Channel 226A at Wautoma, Wisconsin and give cut-off protection to Wautoma's pending FM application.

2. Aside from the reimbursement objections already raised by Murphy (see n.1 above), Murphy fully supports the NPRM. The NPRM's allotment proposals are technically and legally correct; moreover, the proposed WISS-FM channel substitution not only would allow the community of DeForest (1990 U.S. Census pop. 4482) to have its first local transmission service but also would permit WISS-FM to seek a 6-kilowatt Class A "upgrade," which is not technically feasible on WISS-FM's present frequency. On the other hand, as Murphy will now demonstrate, the Markesan and Wautoma counterproposals are so flawed legally and technically that Murphy recommends that both of them should be dismissed summarily without further consideration. Although Murphy is preliminarily commenting on the counterproposals at this time, he will do so more fully if and when they appear on Public Notice.

The Two Counterproposals

3. The counterproposals are quickly summarized. Markesan proposes that Channel 284A should be allotted as a first local transmission service to Markesan, Wisconsin (1990 U.S. Census pop. 1519), that no allotment should be made to DeForest, Wisconsin, and that the allotments at Berlin and Wautoma, Wisconsin should remain the same. For its part, Wautoma proposes that its present Channel 226A allotment at Wautoma (1990 U.S. Census pop. 1797) should be upgraded to Channel 226C3, that no allotment should be made to DeForest, and that the allotment at Berlin should remain the same. Thus, the two counterproposals are mutually exclusive with each other and with the DeForest and Berlin allotment proposals in the NPRM.

Both Counterproposals Have Fatal Legal Defects

4. Turning first to the legal infirmities of the counterproposals, it is well-established that only construction permittees or licensees are eligible under §1.420(g)(3) to request frequency upgrades. See, e.g., FM Table of Allotments (Arlington TX et al.), 6 FCC Rcd 2050 (1991). Thus, since Wautoma was not a permittee when it filed its counterproposal on June 11, 1993 (its application is still pending as of June 25, 1993), Wautoma's counterproposal cannot be considered and should be summarily denied.

5. A second legal defect in Wautoma's proposal flows from the fact that DeForest's and Markesan's proposed first

local transmission services are presumptively favored over Wautoma's plan to upgrade from Class A to Class C3. See FM Table of Allotments (Benton AR et al.), 3 FCC Rcd 4840 (MM Bur. 1988) (first service to communities has a higher public interest priority than mere upgrades of existing channels). In such circumstances, a petitioner is expected to provide a showing of need for the proposed frequency upgrade, and, absent such a showing, "a conflicting new allotment would be favored since it represents a new service". Id. However, Wautoma's counterproposal contains no such showing, only the single phrase that the community of Wautoma "would be provided with a wide coverage FM service" (Counterproposal, p. 3). This statement is so deficient that Wautoma's proposal should be dismissed as a matter of law for failure to comply with the Benton AR "need" standard.

6. Murphy also urges that a third fatal legal flaw - - abuse of the Commission's FM rulemaking process -- infects both counterproposals. Murphy submits that where, as here, the same consulting engineer (Lyle Robert Evans) files two

filings here is an attempt by the proponents or their agent (Mr. Evans) to illegally "stack the deck" in this proceeding against DeForest and Murphy for illicit purposes. Certainly, Mr. Evans knew (or should have known) that he was simultaneously preparing inconsistent engineering counterproposals on behalf of two clients (submitted two days apart), and it strains credulity to believe that neither Markesan nor Wautoma was aware of the charade.

7. When focusing on abusive use of filings in FM allotment proceedings in Abuses of the Commission's Processes, 5 FCC Rcd 3911, 3914 ¶29 (1990), recon. denied, 6 FCC Rcd 3380 (1991), the Commission held:

A statement of interest in operating a station made by a party who, in fact, lacks the requisite intent to construct and operate the proposed facility will henceforth be considered a material misrepresentation within the meaning of Section 73.1105 of the Rules and would be subject to prosecution pursuant to Section 502 of the [Communications] Act [of 1934, as amended], forfeiture pursuant to Section 503 of the Act or other appropriate administrative sanctions.

Thus, under the circumstances of the instant case, Murphy submits that the appropriate solution is to summarily dismiss both counterproposals as fatally defective and abusive of the Commission's processes. See FM Table of Allotments (Monterey TN et al.), 7 FCC Rcd 1606, 1607 ¶6 (1992) (issues concerning misconduct occurring inside an allotment proceeding are relevant to the determination concerning the action to be taken in that proceeding); FM Table of Allotments (Atlantic IA et al.), 7 FCC Rcd 1370, 1371 n.5 (MM Bur. 1992) (Commission

will not allot a channel where there is no assurance that a party will file an application for the allotment).

**The Wautoma Counterproposal
is Technically Unacceptable**

8. As to engineering infirmities in the counter-proposals, attached hereto is an Engineering Statement ("Statement") by Clarence M. Beverage of Communications Technologies, Inc., which preliminarily concludes (at 1) that the Markesan proposal does not have any technical defects. However, the Statement (at 1-2) also concludes that the




Table of Allotments (Beeville TX), 6 FCC Rcd 6051, 6051 n.1 (MM Bur. 1991).

DeForest Is Superior on a Comparative Basis

10. Finally, assuming arguendo that the Markesan counterproposal is not dismissed summarily, Murphy urges that the DeForest first-service proposal deserves a dispositive allotment preference over it. This is so because the Commission presumes that the most populace community has the greatest need for a first local service, provided that it has commensurately greater civic, cultural, religious, social, and commercial attributes. See Affinity Communications, Inc., 96 FCC 2d 685 (Rev. Bd.), rev. denied, FCC 84-625 (Comm'n 1984). In the instant case, the population of DeForest is more than twice that of Markesan, and Markesan has provided no socio-economic information to rebut the presumption in favor of DeForest. Therefore, the DeForest proposal should prevail. See Baker v. FCC, 834 F.2d 181, 183 n.4 (D.C. Cir. 1987) (the need for radio service is assessed primarily in light of the facilities presently available in the proposed communities and their relative population); Land O'Lakes Broadcasting Corp., 4 FCC Rcd 344 (1989).

Conclusion

11. In light of the foregoing, Murphy respectfully requests that the Commission should summarily dismiss or deny the Markesan and Wautoma counterproposals, However, Murphy

urges that the Commission should not amend the FM Table of Allotments as proposed in the NPRM unless DeForest Broadcasting Company restates its reimbursement commitment to WISS-FM and any resulting Report and Order contains a special ordering clause relieving Murphy from the requirement of filing a frequency modification application until 90 days after the

**ENGINEERING STATEMENT
PREPARED ON BEHALF OF
KINGSLEY H. MURPHY, JR.
IN OPPOSITION TO A
COUNTERPROPOSAL IN MM DOCKET NO. 93-91
AMENDMENT OF SECTION 73.202(b)
TABLE OF ALLOTMENTS
FM BROADCAST STATIONS
(BERLIN, DE FOREST AND WAUTOMA, WISCONSIN)**

JUNE 1993

**ENGINEERING STATEMENT
PREPARED ON BEHALF OF
KINGSLEY H. MURPHY, JR.
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FM BROADCAST STATIONS
(BERLIN, DE FOREST AND WAUTOMA, WISCONSIN)**

JUNE 1993

SUMMARY

The following statement has been prepared on behalf of **Kingsley H. Murphy, Jr. ("Murphy")**, licensee of FM broadcast station WISS, Channel 272A, Berlin, Wisconsin. **Murphy** is a party to this proceeding in that the proposed Rule Making suggests deletion of WISS's current frequency of operation, Channel 272A at Berlin, Wisconsin and the substitution of Channel 284A at Berlin, Wisconsin. **Murphy** is agreeable to the proposed channel change since it would allow

the antenna/tower location of a Channel 226C3 operation approximately twelve kilometers Southeast of the City of Wautoma, Wisconsin Reference Coordinates. In addition, the antenna/tower of Station KFKQ(FM), New Holstein, Wisconsin, must be relocated approximately twelve kilometers East of its authorized coordinates."

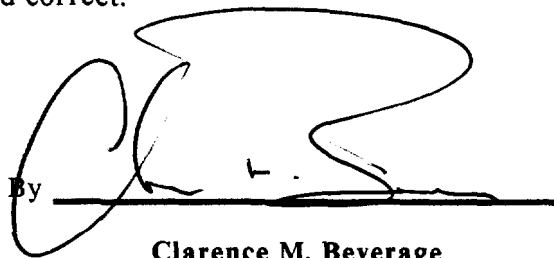
Inspection of the counterproposal shows that the petition is not complete. Wautoma states that the site for KFKQ(FM) must be moved approximately 12 km east but does not include an allocation study and reference coordinates for the KFKQ change.

The Wautoma engineering statement, Attachment E-B, is an allocation study for Channel 226C3 at the restricted coordinates specified by Wautoma in its counterproposal. Inspection of the allocation study shows short spacings of less than 0.5 km to WDUX Channel 224A, WIZM Channel 227C and WQFM Channel 227B. When short spacings are taken into account, it is realized that the site area for the Channel 226C3 upgrade is less than 1 km across.

Attached to the statement as Table I is an allocation study for KFKQ, Channel 225A, New Holstein, Wisconsin, using the coordinates specified in MM Docket No. 89-548 where KFKQ was ordered from Channel 226A to Channel 225A. KFKQ cannot move 11 km east as Wautoma ~~proposes to move to meet Section 72.207 standards with regard to the proposed Channel 226C2~~

[illegible]

The foregoing was prepared on behalf of **Kingsley H. Murphy, Jr.** by Clarence M. Beverage of *Communications Technologies, Inc.*, Marlton, New Jersey, whose qualifications are a matter of record with the Federal Communications Commission. The statements herein are true and correct of his own knowledge, except such statements made on information and belief, and as to these statements he believes them to be true and correct.

By 

Clarence M. Beverage
for Communications Technologies, Inc.
Marlton, New Jersey

SUBSCRIBED AND SWORN TO before me

this 25th day of June, 1993,

Esther G. Sperbeck, NOTARY PUBLIC

ESTHER G. SPERBECK
NOTARY PUBLIC OF NEW JERSEY
MY COMMISSION EXPIRES OCT 15, 1997

TABLE I
ALLOCATION STUDY CH 225A
NEW HOLSTEIN, WISCONSIN
JUNE 1993

Search of Channel 225A+ (92.9 MHz), at N. 44 2 37, W. 88 13 34.

CALL	CITY	ST	CHN	CL	S	DIST	SEPN	BRNG	CLEARANCE
WBWIFM	West Bend	WI	223	B	L	68.5	69.0	184.9°	-0.5
ALC	West Bend	WI	223	B	U	68.5	69.0	184.9°	-0.5
ALC	Kewaunee	WI	224	A	U	71.7	72.0	45.4°	-0.3
ALC	Waupaca	WI	224	A	U	75.2	72.0	297.3°	3.2
WDUXFM	Waupaca	WI	224	A	L	75.2	72.0	297.3°	3.2
WAUNFM	Kewaunee	WI	224	A	C	71.7	72.0	45.4°	-0.3
WAUNFM	Kewaunee	WI	224	A	L	71.7	72.0	45.4°	-0.3
WKJFFM	Cadillac	MI	225	C	L	231.1	226.0	87.4°	5.1 *
KFKQ	New Holstein	WI	225	A	A	0.0	115.0	0.0°	-115.0
ALC	Cadillac	MI	225	C	U	231.1	226.0	87.4°	5.1
ALC	New Holstein	WI	225	A	V	6.0	115.0	95.6°	-109.0
ALC	Birnamwood	WI	225	A	V	133.1	115.0	321.9°	18.1
NEW	Birnamwood	WI	225	A	A	135.7	115.0	320.4°	20.7
ALC	Wautoma	WI	226	A	D	85.4	72.0	272.1°	13.4
KFKQ	New Holstein	WI	226	A	C	6.0	72.0	95.6°	-66.0 1
ALC	Wautoma	WI	226	A	V	85.4	72.0	272.1°	13.4
ALC	New London	WI	228	C2	U	60.8	55.0	329.3°	5.8
WOZZ	New London	WI	228	C2	L	61.5	55.0	335.2°	6.5

1 ORDERED TO CH 225A, MM DOCKET NO. 89-548

* EASTERLY SITE CHANGE LIMIT

CERTIFICATE OF SERVICE

I, Yvonne Corbett, a secretary in the law offices of Rosenman & Colin, do hereby certify that on this 28th day of June, 1993, I have caused to be mailed, or hand delivered, a copy of the foregoing "REPLY COMMENTS OF KINGSLEY H. MURPHY, JR." to the following:


Michael C. Ruger, Chief*
Allocations Branch
Policy and Rules Division
Mass Media Bureau
Federal Communications Commission
2025 M Street, N.W.
Room 8318
Washington, D.C. 20554

Ms. Kathleen Scheuerle*
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Yvonne Corbett

***BY HAND**